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No. 94-1060

In The

Supreme Court of the United States

October Term, 1994

CLARK EQUIPMENT COMPANY and FORKLIFTS, INC.,

Petitioners,

v.

CONNIE L. HABECKER, Individually and as Personal Representative of the Estate of JOHN R. HABECKER, Deceased, and JOHN MICHAEL HABECKER, Minor, by CONNIE L. HABECKER, his Parent, Natural Guardian, and Next Friend,

Respondents.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS CORRECTLY HOLD THAT THE EVIDENTIARY ERROR CONSTITUTED REVERSIBLE ERROR WHEN THE ERROR CAUSED THE ENTIRE TRIAL TO BE SO PERMEATED WITH INADMISSIBLE EVIDENCE THAT THE ENTIRE FOCUS OF THE TRIAL WAS CHANGED FROM THE RELEVANT ISSUE OF THE DEFECTIVENESS OF THE PRODUCT TO THE IRRELEVANT ISSUE OF THE REASONABLENESS OF DEFENDANTS' CONDUCT, IN CONTRAVENTION OF SETTLED PENNSYLVANIA LAW?

II. DOES EVIDENCE WHICH IS INADMISSIBLE BECAUSE IT IS IRRELEVANT, AND BECAUSE IT CONFUSES THE ISSUES AND MISLEADS THE JURY, BECOME AUTOMATICALLY ADMISSIBLE JUST BECAUSE IT COMES OUT OF THE MOUTH OF AN EXPERT?

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On Petition for a Writ of Certiorari To The United States Court of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

Petitioners are seeking a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Third Circuit in what shall be referred to herein as *"Habecker III"*. The three opinions of the Third Circuit in the *Habecker* trilogy, with their full citations and reference to the location in Petitioners' Appendix where the opinions can be found, are set forth below for easier reference:

Habecker I	*Habecker v. Copperloy Corp.*, 893 F.2d 49 (3rd Cir. 1990) [App. 40a-49a].
Habecker II	*Habecker v. Clark Equipment Co.*, 942 F.2d 210 (3rd Cir. 1991) [App. 25a-39a].
Habecker III	*Habecker v. Clark Equipment Co.*, 36 F.3d 278 (3rd Cir. 1994) [App. 1a-24a].

ADDITIONAL STATUTORY PROVISIONS INVOLVED

Federal Rules of Evidence 401, 402 and 403, as amended, provide as follows:

Rule 401. Definition of "Relevant evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible. Irrelevant Evidence Inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

A. Overview.

This is a strict liability products liability case arising under Pennsylvania state law, and the rule of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) applies. The disposition of this case neither revolves around nor focuses upon any of the issues raised by petitioners but instead focuses upon the issue of relevance, *i.e.*, what evidence is relevant in a Pennsylvania strict products liability case.

The entire trial in *Habecker III* was so completely permeated with evidence which is inadmissible in a Pennsylvania strict products liability case because it is irrelevant to the issues to be tried that it impermissibly and prejudicially changed the central focus of the entire trial. Under the facts and circumstances of the instant case, the claimed issue of what standard an appeals court should use in gauging whether evidentiary error is harmless is a non-issue, for the error was so pervasive and so central that it was clearly reversible error no matter what

standard was employed – even if plaintiffs were required to prove prejudice beyond a reasonable doubt!

As will be discussed in more detail in Section C of this Statement of the Case, under Pennsylvania strict products liability law, a manufacturer is held liable for a defect in a product, such as a failure to install a necessary safety device, even if the manufacturer has exercised all possible care in designing and manufacturing the product and even if the defect was not known or could not have been known or anticipated at the time of the product's design and manufacture. Thus all evidence which bears on the manufacturer's knowledge at the time of the product's design and manufacture and which bears on the reasonableness of the manufacturer's conduct, including evidence of what the manufacturer knew or could have known, knowledge of the desirability of particular safety devices, the state of the art, including what others were doing and any concerns they had in making their own design choices, any industry standards or regulations, any technology or research data, and so forth, is wholly irrelevant, for it impermissibly brings negligence concepts into the case and has a strong likelihood of diverting the jury's attention from the product to the reasonableness of the manufacturer's conduct in choosing its design.

Petitioners have not been honest and forthright in their Statement of Facts when stating that this case was and is not a close case because three defense jury verdicts were rendered. The plaintiffs have yet to receive one fair trial, a trial free from the impermissible and inadmissible negligence-type evidence and a trial in which the focus of the trial is properly on the defectiveness of the product

rather than the reasonableness of the manufacturer's conduct. That a jury may have been so diverted from the real and relevant issue by the massive amounts of irrelevant evidence improperly admitted and the arguments of counsel thereon, and may have felt that the manufacturer exercised reasonable care or even all possible care, *i.e.*, was not negligent, has no bearing whatsoever on the issue of whether the product was defective for failure to incorporate the necessary safety device of an operator restraint system. Indeed, the real, primary purpose of all of the improper evidence introduced by defendants was to divert the jury's attention away from the product and toward the reasonableness of the manufacturer's conduct, because while it could win a negligence case, it could not win a strict liability case in which the product itself was on trial.

What occurred at all three trials is that defendants were permitted to permeate the entire trial with evidence which was and is absolutely irrelevant and absolutely inadmissible under Pennsylvania strict products liability law and to permeate it so completely that the entire focus of the trial was changed from that which was permissible to that which was legally irrelevant. Each time the evidence was permitted under a different guise or theory. Each time the evidence was allowed through the back door where its admission through the front door was clearly prohibited. When the front door was shut, defendants went through the back door, then in the next trial through the side door, and then in the last trial through the attic skylight, to get all of the inadmissible negligence-type evidence in somehow, and, with a sympathetic trial court which believes, and has even stated on

the record, that Pennsylvania strict products liability law, as embodied by the decisions of the Pennsylvania courts and the Third Circuit, is unfair, illogical, contrary to common sense, and just plain wrong, and that such impermissible evidence belongs in a strict products liability case, it succeeded. Now that defendants have had their hands slapped a third time, they would have this Court reward their deliberate interjection of impermissible and inadmissible evidence into the trial despite the fact that the evidence impermissibly turned the entire focus of the trial to negligence concepts. Furthermore, defendants would have this Court adopt the novel concept that evidence which is inadmissible because it is absolutely irrelevant is somehow rendered automatically admissible just because the irrelevant evidence comes out of the mouth of an expert, a proposition that would turn the entire concept of relevant evidence on its ear.

Because of the nature of the issues to be decided, respondents shall now include, within this Statement of the Case, a brief review of the facts, a brief review of Pennsylvania strict liability products liability law, and a brief review of all three *Habecker* trials and decisions insofar as they are relevant to the issues raised by defendants-petitioners.

B. Facts.

The facts giving rise to this products liability action are simple, and were recited by the court in *Habecker III* (App. 2a):

> "John Habecker was a civilian employee of the New Cumberland Army Depot when the

> forklift he was backing down a ramp tumbled from the side of the ramp. Thrown from the forklift, Habecker was tragically killed when the forklift fell on top of him. The forklift was manufactured in 1977 by Clark Equipment Company and was not designed with an operator restraint system (ORS), nor had one subsequently been installed.
>
> "Habecker's estate and family ('Habecker') brought a products liability action . . . against Clark and Forklifts, Inc., the corporation that leased the forklift to the Army, alleging that the forklift was defective due to the lack of an ORS, for example, a seat belt."

For this Court's edification, an operator restraint system ("ORS"), may consist of merely a seat belt or, most often, consists of a seat belt and some type of wings or hip restraints on the seat. Each alone helps to confine the forklift driver so that he is not ejected, and seriously injured or killed, in a forklift turnover. The combination of the two is a system which together greatly increases the safety of the forklift by greatly increasing the chance that the forklift driver is not ejected.

All major manufacturers now equip their forklifts with an ORS as standard equipment. Clark has done so since 1983 when it also offered to retrofit all of its existing forklifts with an ORS for free. Despite its attempts to shroud its ORS in mystery, it was and is a rather simple device. It consists merely of a seat belt which fits a little less snugly than an auto seat belt (not as a safety factor but for ease in operation, as a snug belt will also keep the driver from falling out), and wings on the seat which are placed at shoulder level, so visibility will not be

impaired. Clark produced advertisements touting the safety benefits of its ORS and urging forklift owners to retrofit their forklifts with the ORS, as well as two videos, to which the court in *Habecker II* and *Habecker III* referred, which both specifically showed and stated that ORS are necessary safety devices which are effective and which work and that Clark can prove it, contrary to its rather bizarre position at trial that an ORS, including its own ORS, is not really an effective safety device and can cause more injuries than it prevents. Clark's own expert, Entwisle, testified at trial that Clark's current position is that the operator ought to be restrained, and conceded that while some ORS are more effective than others, all ORS are effective. In fact, since 1983, there is not a single known instance of a restrained operator being crushed and killed in a forklift lateral overturn.

C. Pennsylvania strict liability law.

An overview of Pennsylvania's strict liability product liability law was set forth by the court in *Habecker III* (App. 6a-7a, 13a) and in *Habecker II* (App. 28a-29a, 33a-34a), and will be supplemented herein, for it is central to an understanding of the issues involved in this case, and to an understanding of the *Habecker II* and *Habecker III* decisions which shall be set forth and discussed in the next section.

This Court is also referred to the history and development of Pennsylvania product liability law set forth in *Hammond v. International Harvester Co.*, 691 F.2d 646, 649-650 (3rd Cir. 1982) and *Dillinger v. Caterpillar, Inc.*, 959 F.2d 430, 435-437 (3rd Cir. 1992).

Under Pennsylvania strict products liability law, a manufacturer is held liable for a defect in a product, such as a failure to install a necessary safety device, even if the manufacturer has exercised all possible care in designing and manufacturing the product, *Berkible v. Brantley Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893, 898 (1975); *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966), and even if the defect was not known or could not have been known or anticipated at the time of the product's design and manufacture, *Madjic v. Cincinnati Machine Co.*, 370 Pa.Super. 711, 537 A.2d 334, 337 (1988).

Thus all evidence which bears on the manufacturer's knowledge at the time of the product's design and manufacture and which bears on the reasonableness of the manufacturer's conduct, including evidence of what the manufacturer knew or could have known, knowledge of the desirability of particular safety devices, the state of the art, including what others were doing and any concerns they had in making their own design choices, any industry standards or regulations, any technology or research data, and so forth, is wholly irrelevant, for it impermissibly brings negligence concepts into the case and has a strong likelihood of diverting the jury's attention from the product to the reasonableness of the manufacturer's conduct in choosing its design. The court correctly noted in *Habecker III* (App. 6a) that

> "the Pennsylvania Supreme Court has remained faithful to its view that negligence concepts have no place in a products liability trial. *See, Lewis v. Coffing Hoist Division, Duff-Norton Co., Inc.*, 515 Pa. 334, 528 A.2d 590, 593 (1987)."

Further, the Pennsylvania courts have not allowed a defendant to do indirectly what he cannot do directly by injecting negligence concepts into a strict liability case.

> "What the seller is not permitted to do directly, we will not allow him to do indirectly by injecting negligence concepts into strict liability theory." *Berkible, supra,* 337 A.2d at 899.

In *Carracter v. Colson Equipment Co.*, 346 Pa.Super. 95, 499 A.2d 326 (1985), the court rejected a "state of the art" defense, noting, 499 A.2d at 329, n. 6, that the term "state of the art" for purposes of product liability actions has been given a variety of meanings, including industry custom, government regulatory and licensing standards, or technological feasibility or capability. It held, *supra* at 330-331:

> "(W)e now conclude that ***in the Pennsylvania law of products liability, there is no room for a negligence based defense under the guise of 'state of the art'***. As we have noted above, the term 'state of the art' encompasses various concepts, but ***the common functional feature of all 'state of the art' arguments is that they focus on the knowledge of the defendant and/or the reasonableness of the defendant's conduct rather than on whether the product possessed the design features and/or warnings necessary to make it safe for its intended use.*** Therefore, we conclude that *no magic inheres in the 'state of the art' label* and the 'state of the art' jury charge *should be treated like any other attempt to inject negligence into a product liability case.*" (Emphasis added)

In *Lewis, supra* at 594, the court held that " 'industry standards' go to the negligence concept of reasonable

care and . . . such a concept has no place in an action based on strict liability in tort." In *Madjic, supra,* a judgment was reversed for allowing evidence of ANSI standards. *Accord, Sheehan v. Cincinnati Shaper Co.,* 382 Pa.Super. 579, 555 A.2d. 1352, 1355 (1989), re OSHA standards; and *Santiago v. Johnson Machine and Press Corp.,* 834 F.2d 84 (3rd Cir. 1987), holding that evidence and instruction concerning the technological state of the art, including technology and research data, at the time the product was manufactured constituted reversible error.

The portion of the *Lewis* decision, *supra* at 594, which was quoted extensively by the court in both *Habecker II* (App. 33a) and *Habecker III* (App. 7a) is of the greatest importance to the resolution of this appeal:

> "Having reached the conclusion that ***evidence*** of industry standards relating to the design of the control pendent involved in this case, and evidence of its widespread use in the industry, ***go to the reasonableness of the appellant's conduct in making its design choice,*** we further conclude that ***such evidence would have improperly brought into the case concepts of negligence law.*** We also conclude that ***such evidence would have created a strong likelihood of diverting the jury's attention from the appellant's control box to the reasonableness of the appellant's conduct in choosing its design.*** For those reasons ***we conclude that the trial court correctly ruled the evidence to be irrelevant and hence inadmissible.*** It is well established that ***a trial court should exclude evidence which has a tendency to distract the jury from its main inquiry or confuse the issue.***" (Emphasis added)

D. The *Habecker* trilogy.

All three trials in this case were completely permeated with state of the art, negligence-type knowledge and conduct evidence, over the constant objections of plaintiffs. The entire focus of all three trials was improperly shifted from the defectiveness of the product to the reasonableness of the defendants' conduct in making its design choice, bringing negligence concepts squarely into the trial in contravention of settled Pennsylvania law. In each of the three appeals, this was "Issue I" in plaintiffs' brief to the Third Circuit.

What occurred at the first trial, *Habecker I*, concerning these evidentiary matters, and what was decided by the court in the first appeal, was correctly set forth by the court in *Habecker III* (App. 3a).

What occurred at the second trial, *Habecker II*, concerning these evidentiary matters, and arguments made thereon, was correctly set forth by the court in *Habecker II* (App. 28a, 36a) and *Habecker III* (App. 3a-4a). In *Habecker II*, the Third Circuit again reversed, finding (App. 26a) that "a substantial possibility exists that the inadmissible evidence influenced the jury", and that

> "a substantial possibility exists that the jury ruled for Clark in the mistaken belief that the forklift was not defective so long as Clark could not have known that an operator restraint system would make it safer." (App. 36a).

The trial in *Habecker III* was once again permeated with the inadmissible evidence, this time under a different guise, a guise that it would show that, despite Clark's prior admission of feasibility, the ORS was not really

feasible because Clark had not produced it and therefore it could not have taken it "off the shelf" and put it on the forklift. Much of the evidence which was brought out by defendants' expert Entwisle is outlined by the court in *Habecker III* (App. 11a-12a); defendants were also allowed to use the irrelevant and impermissible evidence to cross-examine plaintiffs' expert. In addition, plaintiffs were prohibited from offering relevant evidence under the threat of opening the floodgates to all of the rest of the clearly irrelevant and inadmissible evidence (*Habecker III*, App. 10a-11a). Entwisle was also permitted to testify in detail as to Clark's alleged careful conduct in studying and producing the safety device, the ORS, the studies and tests he performed at Clark regarding forklift overturns and everything that Clark did in order to study the application of seatbelts on forklifts and to select the safety devices to put on the forklifts, including coming up with the final Clark ORS safety device in 1983 that was patented in 1986 (R. 1506a-1515a). He was also asked questions regarding the American Society of Mechanical Engineers that studies the design and safety of forklifts (R. 1555a-1557a).

In closing argument, defendants carefully reviewed all of the inadmissible evidence and emphasized their very same theme, repeated from *Habecker II*, that in 1977, the knowledge was not available to allow defendants to decide whether or not to put the ORS on the forklift. Defendants argued the concerns which the designers had in 1977 (R. 2045a) and the competing considerations they took into account in making their design choice (R. 2046a). Counsel argued that the forklift industry had acted responsibly (R. 2048a). Defendant then talked about

Clark's task force and the care they used to study the situation and invent the ORS (R. 2055a-2056a):

> "Let's study – let's see how we can balance the question of improving operator safety in a ground level turnover and balance it out against all these concerns that we have talked about. And they studied, and they used all kinds of things to study the situation. . . .
>
> "A company that sets up a task force for three years to study the safety of forklift operators in lateral turnovers, devotes all of that personnel and effort and succeeds in developing the first effective operator restraint system in 1983 which gets patented is something that I believe should be praised. . . . "

The Third Circuit again reversed. It found the evidence, as well as defendants' arguments, irrelevant under Pennsylvania law, and held that the evidence which was admitted "is inadmissible and improperly focuses the jury's attention on Clark's conduct, rather than on the forklift itself", *Habecker III* (App. 12a, 13a, 15a), the very same error which it noted (App. 4a) had caused reversal in *Habecker II* in which

> "We found that there was a substantial possibility that the inadmissible evidence influenced the jury's determination, focusing its attention on Clark's behavior and decision-making rather than on the product's defectiveness."

SUMMARY OF REASONS FOR DENYING THE WRIT

This case does not provide an appropriate vehicle to resolve any perceived conflict in the standard to be used by a federal appeals court in determining whether evidentiary errors constitute reversible error or merely harmless error because the error committed was so pervasive, so central, and so completely changed the entire focus of the trial, that the error was clearly reversible error no matter what standard was employed, even if plaintiffs were required to prove prejudice beyond a reasonable doubt.

Furthermore, the standard used by the Third Circuit, and followed by other circuits, is correct. The Third Circuit is correct both in its verbal formulation of the standard and in the manner in which it is actually interpreted and applied, as evidenced by its decision in *Habecker II* in which it found reversible error because "a substantial possibility exists that the inadmissible evidence influenced the jury".

In addition, petitioners have waived this issue and/or are estopped from raising it because the standard used by the Third Circuit was the standard which petitioners specifically agreed ought to be used.

As to Issue II, this case does not present any issue as to whether expert testimony is governed by the Federal Rules of Evidence or substantive state law, because under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993), the trial court is required to make an initial determination as to whether the evidence is relevant. " 'Expert testimony which does not relate to any issue in the case is

not relevant and, ergo, nonhelpful.' " *Supra* at 2795. Since it is undisputable that the evidence introduced by defendants was totally irrelevant under Pennsylvania strict liability law, the mere fact that the irrelevant and inadmissible evidence came from the mouth of an expert did not transform it into admissible evidence. Furthermore, any such evidence, in accordance with settled Pennsylvania authority, diverts the jury from the issue of the defectiveness of the product to the reasonableness of the manufacturer's conduct, and thus confuses the issues and misleads the jury. It would therefore, in any event, be inadmissible under Rule 403.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE EVIDENTIARY ERROR CONSTITUTED REVERSIBLE ERROR WHEN THE ERROR CAUSED THE ENTIRE TRIAL TO BE SO PERMEATED WITH INADMISSIBLE EVIDENCE THAT THE ENTIRE FOCUS OF THE TRIAL WAS CHANGED FROM THE RELEVANT ISSUE OF THE DEFECTIVENESS OF THE PRODUCT TO THE IRRELEVANT ISSUE OF THE REASONABLENESS OF DEFENDANTS' CONDUCT, IN CONTRAVENTION OF SETTLED PENNSYLVANIA LAW.

There is plainly no issue to be decided by this Court. The standard to be used by a federal appeals court in determining whether evidentiary errors constitute reversible error or merely harmless error is not an issue in this case. Even if the standard were to require the plaintiffs to conclusively prove prejudice beyond a reasonable doubt,

and petitioners do not claim such a demanding standard, that standard would easily be met in the instant case.

For the third straight trial, defendants were successful in turning what should have been a trial on the theory of strict liability into a negligence trial. For the third straight trial, the defendants, aided by a trial judge with a stated belief that the state strict products liability law was unfair, illogical, and wrong, and who has now, finally, reassigned this case to a different judge for retrial, deliberately interjected into the trial a massive amount of evidence which was legally irrelevant to the issue of strict liability, that is, whether the product was defective, but which related solely to the irrelevant knowledge, care and conduct of the manufacturer and seller, evidence showing that defendant was a "good boy", that it acted with all possible care in making its design choice, and which defendants emphasized in closing argument. The entire trial was so completely permeated with and focused upon evidence, testimony and argument concerning this state of the art, knowledge and conduct, negligence-type testimony, over the constant objections of plaintiffs' counsel and motions for mistrial, so as to turn the central focus of the entire trial to negligence concepts, in clear contravention of settled Pennsylvania law.

Under these facts and circumstances, it is beyond peradventure that the substantial rights of the plaintiffs were affected. 28 U.S.C. § 2111. Just as in *Habecker II*:

> "a substantial possibility exists that the jury ruled for Clark in the mistaken belief that the forklift was not defective so long as Clark could not have known that an operator restraint system would make it safer." (App. 36a)

Indeed, there can be no doubt that defendants wanted to try a negligence case rather than a strict liability case and they did everything in their power to do so. A negligence case was the only case the defendants could win, because they could present evidence that they acted reasonably in light of the knowledge available to them in 1977, but it is apparent that they were afraid to try a strict liability case because it would be difficult if not impossible, under the facts and properly admitted evidence, for them to establish that the forklift, which was not equipped with the necessary safety device of an ORS, was not defective. Having brought in all of the negligence-type evidence and argued negligence concepts for the express purpose of prejudicing plaintiffs' strict liability case, and having succeeded in accomplishing their objectives, it is nothing short of incredible that defendants can argue, with a straight face, that plaintiffs' substantial rights were not affected under any formulation of the standard to be employed.

The evidence was and is clearly irrelevant. "Evidence which is not relevant is not admissible." Fed. R. Evid. 402. Furthermore, the words of the Pennsylvania Supreme Court in *Lewis, supra,* should haunt petitioners, quoted as they were in both *Habecker II* and *Habecker III.*

> "[E]vidence . . . [which] goes to the reasonableness of the appellant's conduct in making its design choice . . . would have improperly brought into the case concepts of negligence law. We also conclude that *such evidence would have created* ***a strong likelihood of diverting the jury's attention*** from the appellant's control box to the reasonableness of the appellant's conduct in choosing its design. For those reasons *we*

> *conclude that the trial court correctly ruled the evidence to be* ***irrelevant and hence inadmissible.*** It is well established that *a trial court should exclude* ***evidence which has a tendency to distract the jury from its main inquiry or confuse the issue."*** (Emphasis added)

Thus the evidence was clearly inadmissible under both Fed. R. Evid. 402 and 403. And it should be noted that time and time again, in cases set forth in the previous section of this brief regarding Pennsylvania strict liability law, defense verdicts have been consistently reversed when ***any*** of this irrelevant negligence-type evidence has been admitted because the courts have uniformly found it to be highly prejudicial and to substantially affect the rights of the parties.

Defendants-petitioners have merely set up the proverbial straw man and then attempted to knock it down. In assessing the verbal formulation of the standard, rather than how it is actually used in practice, they have attempted to pit the Third, Eleventh, and D.C. Circuits against the Eighth, Ninth and Tenth Circuits. Not only do they ignore that the First Circuit uses the same highly probable standard as the Third Circuit, *Harrison v. Sears, Roebuck and Co.*, 981 F.2d 25, 29 (1st Cir. 1992), but either verbal formulation of the standard has easily been met in the instant case.

Furthermore, not only is the Third Circuit's careful and scholarly analysis in *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916 (3rd Cir. 1985) correct, but petitioners ignore the manner in which the standard is actually applied in practice. In using the highly probable verbal formulation, the Third Circuit reversed in *Habecker II* only

after concluding that "a substantial possibility exists that the inadmissible evidence influenced the jury" (App. 26a), thus giving short shrift to petitioners' argument that cases are being reversed right and left where the evidentiary errors had no effect on the case's outcome.

And note how the D.C. Circuit interprets its standard. In *Barth v. Gelb*, 2 F.3d 1180, 1188 (D.C. Cir. 1993), the court acknowledged that its standard, set forth in *Williams v. United States Elevator Corp.*, 920 F.2d 1019, 1022-1023 (D.C. Cir. 1990), had its basis in *Kotteakos v. United States*, 328 U.S. 750 (1946):

> "In *Williams*, we stated that in determining whether an error in a civil case was harmless, '[t]he proper inquiry is "whether the error itself had substantial influence. If so, or if one is left in grave doubt, the [verdict] cannot stand." . . . This inquiry "involves an assessment of the likelihood that the error affected the outcome of the case." ' *Id.*, at 1023 (quoting *Kotteakos v. United States*, 328 U.S. 750, 765. . . .)."

In *Kotteakos*, *supra* at 764, this Court stated that:

> "[T]he question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting."

This Court held, *supra* at 765:

> "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the

> judgment was not substantially swayed by the error, *it is impossible to conclude that substantial rights were not affected.* The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the [verdict] cannot stand." (Emphasis added)

All of the circuits, in actual practice, apply their standards similarly, no matter how worded, and do not reverse unless there is substantial prejudice as a result of the error. *See, e.g., McGowan v. Cooper Industries, Inc.*, 863 F.2d 1266, 1271 (6th Cir. 1988), in which the court found that the exclusion of evidence was "inconsistent with substantial justice" where the exclusion was "unfairly prejudicial to the appellants". In assessing whether the error affected the substantial rights of the parties, none of the circuits, no matter how their verbal standard is worded, rush to reverse judgments unless the error has in fact had substantial influence on the verdict. This Court in *Kotteakos* acknowledged that an individualized weighing process must take place in each and every case. There is no indication, and no empirical evidence, that any circuit is in fact applying the harmless error standard in such a haphazard fashion that cases in which quite minor errors occur, errors which could not have affected the outcome of the case, are being reversed. There is really no problem in fact. We have nothing but petitioners' hyperbole. Petitioners attempt to bring their own specious statistical analysis to this Court, an analysis which eliminates a myriad of relevant factors, but they have not supplied this Court with any concrete cases at all in

which it is claimed that a different result would obtain if the verbal standard was different.

Finally, respondents assert that petitioners have waived this issue and/or are estopped from raising it. They told the Third Circuit to use the very standard of which they now complain. The evidentiary error was presented by plaintiffs, as always, as Issue I. In defendant Clark's argument on Issue I in its brief to the Third Circuit, it stated, p. 31, n. 26:

> "Defendant agrees that if the admission of evidence is deemed erroneous it is subject to the harmless error review and judgment for defendant should not be set aside if it is highly probable that the jury would have reached the same verdict without hearing the allegedly inadmissible evidence."

Defendant Forklifts, in its brief, p. 13, stated only that it

> "incorporates by reference and adopts the standard of review and argument set forth by Clark Equipment Company in its Brief on this issue."

Having told the Third Circuit to apply the highly probable standard, defendants are hardly in a position to complain that the court applied that standard. Any error claimed was invited and defendants should be held to have waived the issue and to be estopped from raising it.

II. EVIDENCE WHICH IS INADMISSIBLE BECAUSE IT IS IRRELEVANT, AND BECAUSE IT CONFUSES THE ISSUES AND MISLEADS THE JURY, DOES NOT BECOME AUTOMATICALLY ADMISSIBLE JUST BECAUSE IT COMES OUT OF THE MOUTH OF AN EXPERT.

Contrary to petitioners' assertion, this case does not present any issue as to whether expert testimony is governed by the Federal Rules of Evidence or substantive state law. Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993), the trial court is required to make an initial determination as to whether the evidence is relevant. Since it is undisputable that the evidence proffered was totally irrelevant under established Pennsylvania strict liability law, the mere fact that the irrelevant and inadmissible evidence came from the mouth of an expert did not transform it into admissible evidence. Furthermore, *Daubert* confirms that Fed. R. Evid. 403 applies to expert testimony. Since settled Pennsylvania authority clearly holds that any evidence such as that introduced by defendants does not belong in a strict liability case because it diverts the jury from the issue of the defectiveness of the product to the irrelevant issue of the reasonableness of the manufacturer's conduct, and thus confuses the issues and misleads the jury, it would also be clearly inadmissible under Rule 403.

Petitioners would have this Court adopt the novel concept that evidence which is inadmissible because it is absolutely irrelevant, and because it confuses the issues and misleads the jury, all as established by settled authority, is somehow rendered automatically admissible under

Fed. R. Evid. 702 just because the irrelevant and prejudicial evidence comes out of the mouth of an expert. That proposition would turn the entire concept of relevant evidence on its ear, would make a mockery of all of the rules of evidence, and would effectively destroy established state substantive law in violation of the *Erie* doctrine as well.

Incredibly, petitioners base their argument on *Daubert*. It is readily apparent that petitioners have engaged in a selective reading of *Daubert* and have ignored many of its central holdings which stop petitioners' arguments in their tracks. First and foremost is *Daubert*'s holding on the issue of relevance. This Court held, 113 S.Ct. at 2795-2796:

> "Rule 702 further requires that the evidence or testimony 'assist the trier of fact to understand the evidence or *to determine a fact in issue.*' ***This condition goes primarily to relevance. 'Expert testimony which does not relate to any issue in the case is not relevant and, ergo, nonhelpful.***' 3 Weinstein & Berger ¶ 702[02], p. 702-18." (Emphasis added)

This Court further held, 113 S.Ct. at 2799:

> "To summarize: . . . the Rules of Evidence – especially Rule 702 – do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation ***and is relevant to the task at hand.***" (Emphasis added)

The testimony introduced by defendants did not relate to any issue in the case, *i.e.*, the defectiveness in the product, but instead related to and focused upon the

issue which was irrelevant as a matter of settled Pennsylvania authority in a strict liability action, the reasonableness of the manufacturer's conduct in making its design decision. Since it did not relate to any issue properly in the case, it did not assist the jury to determine a fact in issue, was not relevant, was nonhelpful, and did not meet the requirements for admissibility under Rule 702 under the clear holding of *Daubert*.

It should also be apparent that any other holding would be contrary to the dictates and principles of *Erie* because it would effectively gut Pennsylvania's strict liability products liability law which that state has taken such pains to carefully develop over the decades. If evidence is allowed to be admitted in a federal court trial through the mouth of an expert, despite the fact that the evidence is wholly irrelevant to the concept of strict liability, but relates only to the irrelevant issue of the reasonableness of the manufacturer's conduct, then all that the state has sought to accomplish in its development of strict liability will be lost. Federal court products liability trials will effectively be negligence trials, not strict liability cases, because all of the irrelevant and otherwise prohibited negligence-type evidence, together with all of the extensive argument thereon, will be before the jury, just as happened in the instant case. In short, Pennsylvania strict products liability law will cease to exist. While this is precisely the result sought by petitioners, *Erie* will not permit it.

Nor is there any merit to petitioners' argument that the inadmissible state of the art, negligence-type knowledge and conduct evidence should be admissible for another purpose such as to test the opinion of an expert

witness or his credibility. *See, e.g., Minichello v. U.S. Industries, Inc.*, 756 F.2d 26, 29 (6th Cir. 1985):

> "It attempts to argue, nonetheless, that the OSHA regulations may have been admissible ***for the limited purpose of testing whether the expert witness was correct in his opinion*** that the bolster plate was defective. What counsel for U.S. Industries describes as a limited purpose ***is not a limited purpose at all***, however. The question of whether the expert was right in considering the plate defective merges into the question of whether the plate was defective. ***The so-called limited purpose for which the evidence was purportedly admitted, then, is inseparable from the purpose for which we have shown the evidence would have been inadmissible.***" (Emphasis added)

Followed, Bailey v. V & O Press Co., Inc., 770 F.2d 601, 608-609 (6th Cir. 1985).

This Court also made it clear in *Daubert*, 113 S.Ct. at 2797-2798, that Fed. R. Evid. 403 applies to expert testimony:

> "Throughout, a judge assessing a proffer of expert scientific testimony under Rule 702 should also be mindful of other applicable rules. . . . Rule 403 permits the exclusion of relevant evidence 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . . ' Judge Weinstein has explained: 'Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge, in weighing possible prejudice against probative force under Rule 403 of the present rules, exercises

more control over experts than over lay witnesses.' Weinstein, 138 F.R.D. at 632."

As the court clearly and specifically held in *Lewis, supra* at 594, the evidence which defendants introduced in this case, and which defendants argued extensively to the jury, was "evidence . . . [which] goes to the reasonableness of the appellant's conduct in making its design choice" and therefore was evidence which "improperly brought into the case concepts of negligence law." Just as in *Lewis*, "such evidence . . . created **a strong likelihood of diverting the jury's attention** from the [product] to the reasonableness of the appellant's conduct in choosing its design." "For those reasons", not only was the evidence "irrelevant and hence inadmissible", but also, as the court so specifically held in *Lewis*, that very evidence which the defendants herein introduced was required to be excluded because it "**has a tendency to distract the jury from its main inquiry or confuse the issue.**" In other words, the evidence was required to be excluded because of the very factors set forth in Fed. R. Evid. 403.

For the above reasons, there is no issue to be decided by this Court because there is no conflict whatsoever in this case between the Federal Rules of Evidence and state substantive law. Indeed, this case is an illustration of a situation in which they complement each other rather nicely. State substantive law informs the federal court what is and is not relevant in a strict liability case, and the federal court is then able to exclude the irrelevant expert testimony, consistent with the dictates of Rule 702, *Daubert*, and *Erie*.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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